IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. .....

DAMPSKIBSSELSKABET DANNEBROG, a corporation, Claimant of the Motorship "STJERNEBORG", and AKTIESELSKABET BORGESTAD, a corporation, Claimant of the Motorship "BRAND",

Petitioners,

vs.

SIGNAL OIL AND GAS COMPANY OF CALIFORNIA, a corporation,

Respondent.

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

Opinion for the District Court written by Judge Cushman (R. 154-163), was filed December 7, 1938, and was reported at 25 Fed. Supp. 632.

The opinion of the Circuit Court of Appeals (Circuit Judges Wilbur, Haney and Healy) written by Judge Haney, was filed October 26, 1939 (R. 222-227) and is reported in 106 Fed. (2d) 896.

JURISDICTION

Jurisdiction of this court is invoked under Judicial Code sec. 240(a), as amended by Acts of February

13, 1925, ch. 229, sec. 1, 43 Stat. 938; January 31, 1928, ch. 14, sec. 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926 (28 U. S. C. A., sec. 347(a)).

The decree of the Circuit Court of Appeals to be reviewed was entered October 26, 1939 (R. 228). No petition for rehearing was filed.

The three months period allowed by act of February 13, 1925, ch. 229, sec. 8 (28 U. S. C. A., sec. 350) for filing ends January 25, 1940.

The foregoing petition and this brief will have been filed before January 25, 1940.

FACTS

The facts in this cause material to the question presented for review have been recited in the "Summary of Facts" contained in the foregoing petition.

QUESTION PRESENTED

There are two phases in the question presented to this court for decision.

First, whether a charterer who, by the charter party was required "to provide and pay for all" fuel oil, was without authority to subject the vessel to a maritime lien under sec. 30 of the Merchant Marine Act of June 5, 1920 (46 U. S. C. A. 971-975).

Second, whether a supplier relied upon the credit of the vessel and obtained a maritime lien, when fuel oil was furnished solely upon the order of the charterer, as buyer, pursuant to prior general sales contract obligating the supplier to sell for "any and all vessels owned, chartered and or operated" later by the buyer, obligating the supplier to extend credit to the buyer, and reserving in the supplier no right to refuse delivery to any vessel as to which the

subsequent charter party of the buyer might not permit the creation of a lien.

SPECIFICATIONS OF ERRORS ASSIGNED

(1) The District Court erred in holding that the fuel oil was sold on the credit of the respondent vessels. Assignments of Error 1 (R. 197, 201).

(2) The District Court erred in holding that under the terms of the charter party, the time charterer had authority to pledge the credit of the chartered vessel and create a maritime lien against the same. Assignments of Error 15 and 13 (R. 200, 203).

(3) The District Court erred because it failed to hold that under the terms of the general fuel oil sales contract between the supplier and the charterer of the respondent vessel, no maritime lien was contemplated or could arise. Assignments of Error 14 and 12 (R. 200, 203).

SUMMARY OF ARGUMENT

(1) A time charter party provision requiring the charterer to "provide and pay for all" fuel oil deprives the charterer of authority to impose a maritime lien against the vessel for fuel oil supplied.

(2) A supplier who contracts to sell to the buyer all fuel oil required over a long term for "any and all vessels owned, chartered and/or operated" subsequently by the buyer is not entitled to a maritime lien because the oil furnished under such contract was in fact sold exclusively on the buyer's credit, and the pledge of the ship's credit was not necessary to secure delivery.

(3) The time charter party provision and the general sales contract being in wide commercial usage and involving substantial rights, not heretofore interpreted by this court, but differently interpreted by the lower courts, justify and require this court's construction of their meaning.

ARGUMENT

1. Conflict of Decisions Between Circuit Courts of Appeals

The decision of the Ninth Circuit Court of Appeals in the instant case is in conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit in *The Cratheus*, 263 Fed. 693 (Cert. denied, 253 U. S. 492); and in *Pensacola S. Co. v. U. S. Shipping Board*, 277 Fed. 889.

Recognition of this conflict is made in the opinion in the present case (R. 226) by reference to the rule in *The Portland*, 273 Fed. 401 (C. C. A. 9) and in *The Golden Gate*, 52 Fed. (2d) 397 (C. C. A. 9) and to the court's re-examination of the question in *The Ludden*, 66 Fed. (2d) 997 (C. C. A. 9), wherein it was observed that:

> "A simple provision that the charterer must pay for fuel or other necessaries has accordingly been held sufficient to deprive him of authority to bind the vessel. *The Cratheus*, 263 F. 693 (C. C. A. 5th, 1920); *Pensacola Shipping Co. v. United States Shipping Board Emergency Fleet Corporation*, 277 F. 889 (C. C. A. 5th, 1922); *The Mona*, 282 F. 468 (C. C. A. 4th, 1922); *The Dictator*, 18 F. (2d) 131 (D. C. E. D. La., 1927); *Henry W. Breyer*, 17 F. (2d) 423 (D. C.

Md., 1927); *cf. The Ben Lawers*, 42 F. (2d) 897 (D. C. W. D. Wash., 1930). In this circuit, however, the South Coast decision has been accepted as having a wider connotation. In *The Golden Gate*, 52 F. (2d) 397 (1931), cert. denied *Knutsen v. Associated Oil Co.*, 284 U. S. 682, 52 S. Ct. 199, 76 L. Ed. 576, (1932), we held that a charter provision to the effect that the charterer shall provide and pay for fuel does not prevent the attachment of a lien for fuel ordered by the charterer or the ship's officers, in the absence of an express provision prohibiting the charterer from creating liens" (p. 998).

In *The Cratheus, supra* (as in the pending case), the supplier was obligated to the charterers to furnish "all the bunker coal required by them * * * for steamers of which they are owners, charterers, or time charterers or in which they are otherwise interested"; and the charter party required the charterer to "provide and pay for all coal". Upon these facts the court held that no maritime lien arose in favor of the supplier. The conflict is complete and clear.

Further judicial comment on the conflict is found in *The Pajala*, 7 Fed. Supp. 618 (D. C. E. D., N. Y.), again involving a supplier under a general fuel oil sales contract to supply "vessels owned, controlled or operated under charter" asserting a lien against a vessel under time charter, requiring the charterer to "provide and pay for all the bunker oil". A lien was denied the supplier and the court observed:

> "The choice of following the law as announced in this court, rather than the two decisions in the Ninth Circuit, is deliberate and in the belief that correction, if it be appropriate, lies elsewhere."
>
> *The Pajala*, 7 Fed. Supp. 618, 621.

2. Conflict with applicable decision of this Court

The decision in the instant case is in conflict with the analysis and determination of the basic elements of a maritime lien as contained in the decision of this court in *Piedmont, etc. Coal Co.* v. *Seaboard Fisheries*, 254 U. S. 1. There, this court had under consideration different facts. However, the careful deliberate enumeration of the fundamentals of a maritime lien together with the conclusion that such requirements were not modified by any statutory enactments of Congress, indicates that the opinion was intended as a guide to other courts for testing the existence or non-existence of a maritime lien.

The elements of a maritime lien so enumerated are:

> "*Because the ship's need was the source of the maritime lien, it could arise only (1) if the repairs or supplies were necessary; (2) if the pledge of her credit was necessary to the obtaining of them; (3) if they were actually obtained; and (4) if they were furnished upon her credit.*" (Numerals supplied.)
>
> *Piedmont, etc. Coal Co.* v. *Seaboard Fisheries*, 254 U. S. 1, 9.

Petitioners contend that respondent did not in fact furnish fuel oil upon the credit of the vessels and the pledge of the ship's credit was not in fact necessary to secure delivery.

This contention is based upon the respondent's contract with W. L. Conyus & Sons, as buyer, for the future sale of fuel oil to "any and all vessels owned, chartered and or operated" by the buyer.

This contract was made more than half a year in advance of the W. L. Comyn & Sons' charters of the vessels "Brand" and "Stjerneborg". Respondent could not possibly know what charter party restrictions or limitations might be imposed by the owners of the vessels upon the charterer, its buyer. Nevertheless, the respondent by its contract with W. L. Comyn & Sons made no reservation of any right to refuse a sale to its buyer or to refuse a delivery to any vessel because the future charter party or operating agreement negotiated by W. L. Comyn & Sons with some vessel owner conferred no authority to pledge the credit of the vessel or expressly prohibited the creation of a lien. Wholly without regard to the possibly complete lack of authority in its buyer to bind the vessel, respondent's contract granted personal credit to the buyer, as follows:

"Article VI. Payment

The Buyer shall pay the Seller on or before the 10th of each calendar month for all deliveries made hereunder during the preceding calendar month. If at any time the Buyer shall fail to make any payment due hereunder or if the credit of the Buyer shall for any cause be deemed unsatisfactory by the Seller the Seller may, before making further deliveries, require the Buyer to pay for said oil with each order or may suspend deliveries hereunder until such payment has been made or may terminate this contract. No such suspension or termination shall affect the obligations of the Buyer hereunder and such failure to pay shall be deemed a breach of this entire contract" (R. 45, 49; Ex. A).

By this provision respondent not only bound itself to extend credit to its buyer, but it also limited its rights arising from non-payment to remedies against the buyer without reference to any rights or remedies against any vessel. Respondent's contract neither expressly nor impliedly mentioned any obligation of the vessel or any lien against the vessel.

This sales contract is eloquently unlike the sales contract involved in *Bankers Trust Co.* v. *Hudson River Day Line*, 93 Fed. (2d) 457 (C. C. A. 2), which obviously shows the seller's intention to rely upon the credit of both the buyer and the vessel by a provision that the seller "will rely on any vessel receiving fuel oil and or this contract for the purchase price thereof". The court denied a lien upon other grounds.

Petitioners contend that in respondent's assertion of lien two of the essentials of a maritime lien are absent: (a) The fuel oil was not in fact furnished on the credit of the vessels; (b) a pledge of the credit of the vessels was not necessary to a delivery of fuel oil by respondent under its contract with its buyer.

Hence, petitioners submit that the allowance of such a lien by the Appellate Court in this case conflicts with the controlling rule of this Court in the *Piedmont* case, *supra*.

3. Question justifies settlement by this Court

The time charter party provision requiring the charterer "to provide and pay for" fuel and other supplies without other provisions as to liens has not been construed by this court.

The language construed in *The South Coast*, 251 U. S. 519, was:

> "The bare vessel at the time was under charter to one Levick, the contract stipulating that Levick was to pay all charges and to save the owner harmless from all liens and expenses. * * * There was also a provision that the owner might retake the vessel in case of failure of Levick to discharge within thirty days any debts which were liens upon it. * * *"

A lien was allowed because:

> "The charter party recognizes that liens may be imposed by the charterers and allowed to stand for less than a month. * * *."

In *United States* v. *Carver*, 260 U. S. 482, the charter party provided the charterers were "to pay all costs and expenses incident to the use and operation of the vessels, and 'will not suffer nor permit to be continued any lien * * *'." A lien was denied the supplier because under the charter party the charterer had no authority to pledge the vessel's credit. This court said:

> "But the primary undertaking is that a lien shall not be imposed."
>
> 260 U. S. 489.

These two decisions have received different constructions by various federal courts when attempt has been made to inappropriately apply their holdings to a charter party stipulation such as that presented by this case in the New York Produce Exchange Form. The result is confusion with respect to a widely used charter party.

The Cratheus, 263 Fed. 693 (C. C. A. 5);
The Augusta W. Snow, 46 Fed. (2d) 992 (C. C. A. 1);
The J. W. Hennessey, 57 Fed. (2d) 77 (C. C. A. 2);
The Golden Gate, 52 Fed. (2d) 397 (C. C. A. 9);
The Everosa, 93 Fed. (2d) 732 (C. C. A. 1);
The Millinocket, 266 Fed. 392 (D. C., N. Y.);
The Thordis, 290 Fed. 255 (D. C., N. Y.);
The A. S. Sherman, 51 Fed. (2d) 782 (D. C., N. Y.);
The Pojala, 7 Fed. Supp. 618 (D. C., N. Y.);
The Henry W. Breyer, 17 Fed. (2d) 423 (D. C., Md.);
The U. S. 219, 21 Fed. Supp. 463 (D. C., Penn.);
The City of Helena, 25 Fed. Supp. 864 (D. C., Mo.).

Reference only is made to the various texts containing the New York Produce Exchange charter party to indicate the prominence of this standardized form.

3 Benedict Admiralty (5th ed.) p. 88;
Poor on Charter Parties (2nd ed.) p. 223;
Cases on Admiralty, Lord & Sprague (2nd ed.) p. 967;
8 Nichols Cyclopedia of Legal Forms, p. 439.

Reference also is made to the following cases dealing with similar general sales contract clauses obligating the seller to supply any and all vessels owned, chartered or operated by the buyer.

The Cratheus, 263 Fed. 693 (C. C. A. 5);
The Portland, 273 Fed. 401 (C. C. A. 9);
The Golden Gate, 52 Fed. (2d) 397 (C. C. A. 9);
The Dictator, 18 Fed. (2d) 131 (D. C., La.);
The Pajala, 7 Fed. Supp. 618 (D. C., N. Y.).

The absence of any adjudication by this court determinative of the effect of a charter party and a contract in extensive use, combined with the existing conflict of decision in maritime circuits, and with this court's prior decision, makes this court's review of the Circuit Court of Appeals ruling in the instant case of public importance.

CONCLUSION

Wherefore, it is respectfully submitted that the foregoing petition should be granted for the reasons assigned.

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